No. 21-10985

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,

v.

CHRISTOPHER A. NOVINGER AND ICAN INVESTMENT GROUP, LLC
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Texas
Fort Worth Division
No. 4:15-cv-00358-O
Hon. Reed O'Connor

APPELLANTS' REPLY BRIEF

Margaret A. Little
Senior Litigation Counsel
Kara M. Rollins
Litigation Counsel
Mark Chenoweth
New Civil Liberties Alliance
1225 19th St. NW, Ste. 450
Washington, DC 20036
202-869-5210
peggy.little@ncla.legal
Attorneys for Defendants-Appellants

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. COURTS MUST BE VIGILANT AGAINST ADMINISTRATIVE AGENCY ENCROACHMENTS UPON AMERICANS' CIVIL LIBERTIES 1

A. The District Court Erred with Respect to the Government's Burden 1

B. The Gag Power Was Lawless and Deceitful from Its Inception 1

C. SEC Requires Defendants to Surrender Their First Amendment Rights Before It Will Come to the Settlement Table 2

D. Congress Itself Could Not Enact Such a Law 5

E. The Gag Is Not "Something SEC Might Have Won in Litigation" 8

II. SEC MISCONSTRUES THE CONTROLLING CASE LAW 12

A. Defendants' Constitutional Claims Are Before this Court 12

B. The District Court Decision Conflicts with the Supreme Court's Decision in *Klapprott* and Precedents in Other Circuits 14

1. Due Process 17

2. Jurisdiction 17

C. SEC Has Admitted That Rule 60 Is the Proper Mechanism 19

D. Collateral Bar Rule 20

E. *Romeril*'s Reading of *Crosby* Creates an Intra-Circuit Split 22

III. COURTS LACK POWER TO ENTER UNCONSTITUTIONAL ORDERS 25

CONCLUSION 26

CERTIFICATE OF SERVICE 27

CERTIFICATE OF COMPLIANCE...28

TABLE OF AUTHORITIES

Page(s)

Cases

Baskin v. Royal Goode Productions LLC,
Case No. 8:21-cv-2558-VMC-TGW, 2021 WL 6125612
(M.D. Fla. Nov. 19, 2021) 24

Boyd v. United States,
116 U.S. 616 (1886)....................5

Brumfield v. La. State Bd. of Educ.,
806 F. 3d 289 (5th Cir. 2015) 13

Carter v. Fenner,
136 F.3d 1000 (5th Cir. 1998) 13, 14, 18

Cato Inst. v. SEC,
4 F.4th 91 (D.C. Cir. 2021)....................3, 20

Cochran v. SEC,
20 F.4th 194 (5th Cir. 2021) 4, 5

Crosby v. Bradstreet,
312 F.2d 483 (2d Cir. 1963) 19

Davies v. Grossmont Union High Sch. Dist.,
930 F.2d 1390 (9th Cir. 1991) 16, 18

Elrod v. Burns,
427 U.S. 347 (1976)....................7

Entick v. Carrington,
19 How. St. Tr. 1030 (1765)....................5

G & V Lounge, Inc. v. Mich. Liquor Control Comm'n,
23 F. 3d 1071 (6th Cir. 1994) 16, 18

Gabarick v. Laurin Mar. (Am.) Inc.,
753 F.3d 550 (5th Cir. 2014) 20

Gonzales v. Crosby,
545 U.S. 524 (2005)....................15

In re Pac. Ry. Comm'n,
32 F. 241 (N.D. Cal. 1887) 5

Jones v. SEC,
298 U.S. 1 (1936) 4, 5

Klapprott v. U.S.,
335 U.S. 601 (1949) 14, 15, 16

Landmark Commc'ns, Inc. v. Virginia,
435 U.S. 829 (1978) 6

Marbury v. Madison,
5 U.S. 137 (1803) 20, 25

McBryde v. Comm. to Review Circuit Council Conduct,
83 F. Supp. 2d 135 (D.D.C. 1999) 5, 6, 21

McGirt v. Oklahoma,
140 S. Ct. 2452 (2020) 12

Montgomery v. Louisiana,
577 U.S. 190 (2016) 25

Morrison v. Olson,
487 U.S. 654 (1988) 3

Overbey v. Mayor of Balt.,
930 F.3d 215 (4th Cir. 2019) 16, 18

People v. Smith,
502 Mich. 624 (2018) 18

Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship,
507 U.S. 380 (1993) 15

R.A.V. v. City of St. Paul, Minn.,
505 U.S. 377 (1992) 1

Rosenberger v. Rector & Visitors of the Univ. of Va.,
515 U.S. 819 (1995) 1

Scott v. Schedler,
826 F.3d 207 (5th Cir. 2016) 17

SEC v. Bolla,
550 F. Supp. 2d 54 (D.D.C 1983) 18

SEC v. Romeril,
15 F.4th 166 (2d Cir. 2021) 22

Shalala v. Ill. Council on Long Term Care, Inc.,
529 U.S. 1 (2000)..15

Shelton v. Tucker,
364 U.S. 479 (1960)..7

Town of Newton v. Rumery,
480 U.S. 386 (1986)..3

U.S. v. Caceres,
745 F.2d 935 (5th Cir. 1984) 22

U.S. v. Cutler,
58 F. 3d 825 (2d Cir. 1995) 21

U.S. v. Dickson,
40 U.S. 141 (1841)..12

U.S. v. ITT Cont'l Baking Co.,
420 U.S. 223 (1985)..8

U.S. v. Playboy Ent. Grp., Inc.,
529 U.S. 803 (2000)..1

U.S. v. Sineneng-Smith,
140 S. Ct. 1575 (2020)..23

U.S. v. Walker,
109 U.S. 258 (1883)..25

Virginia v. Am. Booksellers Ass'n,
484 U.S. 383 (1988)..22

Walker v. City of Birmingham,
388 U.S. 307, 336 (1967) 21

Young v. U.S. ex rel. Vuitton et Fils S. A.,
481 U.S. 787 (1987)..3

Other Authorities

11 Charles Allen Wright & Arthur Miller, Fed. Prac. & Proc. Civ. § 2862 (3d ed.)
....19

47 Am. Jur. 2d Judgments § 653 19

49 C.J.S. Judgments § 506 19

Brief for Americans for Prosperity Found. as Amicus Curiae Supporting Defendants-Appellants, SEC v. Novinger (No. 21-10985), Doc. 00516141689 .... 2, 17, 22

Brief of SEC, *Cato Inst. v. SEC*, 438 F. Supp. 3d 44 (D.D.C. 2020), ECF No. 12-1 .... 19, 20

Eric Fuchs, *Why the SEC Lost Its Big Case Against Mark Cuban,* BUSINESS INSIDER (Oct. 17, 2013) 8

Interview by Andrew Ross Sorkin, CNBC, with Raj Rajaratnam (Dec. 8, 2021) 9, 10

Interview by Andrew Ross Sorkin, CNBC, with Rajat Gupta (Mar. 22, 2019)...9

Jason Mazzone, *The Waiver Paradox*, Nw. U. L. Rev. 801 (2003) 7

Marc I. Steinberg, *The SEC v. Mark Cuban*, HARV. L. FORUM ON CORP. GOV. (Apr. 11, 2019) 9

Michael Macchiarola, *Hallowed by History but Not by Reason: Judge Rakoff's Critique of the SEC's Consent Judgment Practice*, 16 CUNY L. Rev. 51 (Winter 2012)...11

New Civil Liberties Alliance, *Petition to Amend* (Oct. 30, 2018)..........................11

Special App'x, SEC v. Romeril, 15 F.4th 166 (D.C. Cir. 2021), ECF No. 14023, 24

Telis Demos, *The man who beat the SEC,* FORTUNE MAGAZINE (June 18, 2008, 3:48 AM)...8

Thomas Cooley, *A Treatise on Constitutional Limitations* (1868) 12

ARGUMENT

I. COURTS MUST BE VIGILANT AGAINST ADMINISTRATIVE AGENCY ENCROACHMENTS UPON AMERICANS' CIVIL LIBERTIES

A. The District Court Erred with Respect to the Government's Burden

"When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed," *U.S. v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 817 (2000), a burden shift that must attach more forcefully to an unlawfully enacted regulation by a mere administrative agency. The SEC gag is both content-based and viewpoint discriminating in that it threatens punishment only for speech that disagrees with SEC's view of its case, Op. Br. 21-24, and even compels what it deems corrective speech, Br. 30-32, and thus is subject to the highest form of judicial scrutiny. *See R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (determining that the Constitution "forbid[s] the State to exercise viewpoint discrimination" which is "an egregious" and "blatant" "violation of the First Amendment").

B. The Gag Power Was Lawless and Deceitful from Its Inception

The rule cited by SEC in its agency-drafted "consents" as authority for the gag was enacted in violation of the APA. SEC responds with an unseemly footnote mocking defendants for being "decades late in asserting a claim related to the absence of notice and comment for Rule 202.5(e)." SEC-Br. 19 n.2. Defendant

Novinger was not even born when SEC deceitfully slipped this rule into the Federal Register while untruthfully asserting that the ostensible "housekeeping" rule "relates only to rules of agency organization, procedure, and practice." *Id.* SEC well knows the rule binds the future speech of defendants with the force of law, criminal contempt, and threat of reprosecution—and SEC routinely wields that power against defendants to compel SEC-favoring speech so as to correct an impression SEC doesn't like. *See*, *e.g.*, Brief for Americans for Prosperity Found. as Amicus Curiae Supporting Defendants-Appellants, *SEC v. Novinger*, at 11-14 (No. 21-10985), Doc. 00516141689 ("AFPF *amicus*"). Indeed, we would not be before this Court if this were not so. SEC's assertion that this gag rule doesn't bind others outside the Commission was not credible in 1973, and it is even more absurd today considering its sustained enforcement of the rule since then.

C. SEC Requires Defendants to Surrender Their First Amendment Rights Before It Will Come to the Settlement Table

The notion that SEC defendants "consent" to being gagged is a fiction belied by SEC's own brief. SEC's brief loftily admits that the price of "*its* consent" to approve a settlement is that defendants agree to the mandatory gag provision. SEC. Br. 4. Thus, no court hearing ever takes place unless and until the "consent" is signed with all SEC-drafted waivers of rights the Commission deploys to its unilateral advantage here.

Furthermore, "voluntary" relinquishment is beside the point. By entering these "consents" and having them incorporated into court orders, SEC is using the federal judiciary and the threat of *contempt*, not just a reopened case, to leverage settlements and the enforcement thereof. *See Cato Inst. v. SEC*, 4 F.4th 91, 95 (D.C. Cir. 2021) ("[A] court may institute criminal contempt proceedings against an SEC defendant who violates a no-deny provision contained in a consent decree issued by that court even absent the SEC's consent."); *see also Young v. U.S. ex rel. Vuitton et Fils S. A.*, 481 U.S. 787, 793-95 (1987); *Morrison v. Olson*, 487 U.S. 654, 676 (1988). That practice is inconsistent with the First Amendment.

SEC overreads *Town of Newton v. Rumery*, 480 U.S. 386 (1986). *Rumery* does not stand for the proposition that a party can freely waive any constitutional right as a condition of settlement. *Rumery* simply rejected a rule that would deem release-dismissal agreements as "invalid *per se*." *Id.* at 397. But the validity of such an agreement turns on other factors including whether the agreement adversely affects "public interests." *Id.* at 397-98. SEC's gag is adverse to public interests because it demands that defendants give up their right to criticize SEC's prosecution forever. It is antithetical to democratic governance, which relies on free and open discourse concerning core subjects such as government power, and it denies listeners their First Amendment right to hear speech. *See infra* I.D. Moreover, *Rumery*

involved the settlement of claims and cross-claims that had a tight fit with the goal of cessation of litigation and involved no surrender of future rights.

This Court, sitting en banc, recently had occasion to review the history of administrative power in *Cochran v. SEC*, 20 F.4th 194 (5th Cir. 2021) (en banc). Judge Oldham's thorough concurrence, joined by judges Smith, Willett, Duncan, Engelhardt, and Wilson, discusses, at length, the Supreme Court's decision in *Jones v. SEC*, 298 U.S. 1 (1936), which warned of the dangers of agencies self-conferring power to violate Americans' civil liberties. *See id.* at 221-23 (Oldham, J., concurring). As the *Cochran* concurrence noted, the *Jones* decision was a "stinging rebuke of the SEC" and included an explanation of the dangers of adopting SEC's theories advanced in that matter:

> The action of the commission finds no support in right principle or in law. It is wholly unreasonable and arbitrary. It violates the cardinal precept upon which the constitutional safeguards of personal liberty ultimately rest—that this shall be a government of laws—because to the precise extent that the mere will of an official or an official body is permitted to take the place of allowable official discretion or to supplant the standing law as a rule of human conduct, the government ceases to be one of laws and becomes an autocracy. Against the threat of such a contingency the courts have always been vigilant, and, if they are to perform their constitutional duties in the future, must never cease to be vigilant, to detect and turn aside the danger at its beginning.

Id. at 222 (quoting *Jones*, 298 U.S. at 23-24). The *Cochran* discussion of *Jones* continues:

> If administrative agencies "are permitted gradually to extend their powers by encroachments—even petty encroachments—upon the

> fundamental right, privileges and immunities of the people," the Court warned that "we shall in the end, while avoiding the fatal consequences of a supreme autocracy, become submerged by a multitude of minor invasions of personal rights, less destructive but no less violative of constitutional guaranties."

Id. at 222 (quoting *Jones*, 298 U.S. at 24-25).

> An investigation that disregards Article III and the Fifth Amendment "is unlawful in its inception and cannot be made lawful by what it may bring, or by what it actually succeeds in bringing, to light." [*Jones*, 298 U.S. at 27]; *see also id.* at 26–28 (citing *In re Pac. Ry. Comm'n*, 32 F. 241 (N.D. Cal. 1887) (Field, J.) (prohibiting unlawful inquisitorial investigations); *Boyd v. United States*, 116 U.S. 616 (1886) (prohibiting compulsory self-accusation); *Entick v. Carrington*, 19 How. St. Tr. 1030 (1765) (prohibiting unlawful searches and seizures)). Allowing such investigations would bring back "those intolerable abuses of the Star Chamber, which brought that institution to an end at the hands of the Long Parliament in 1640." *Id.* at 28. Based on that brooding risk, the Court concluded, "[e]ven the shortest step in the direction of curtailing [individual] rights must be halted in limine, lest it serve as a precedent for further advances in the same direction, or for wrongful invasions of the others." *Ibid.*

Id. at 223.

D. Congress Itself Could Not Enact Such a Law

When Congress enacted a gag as part of its judicial discipline act, it was summarily held unconstitutional. *McBryde v. Comm. to Review Circuit Council Conduct*, 83 F. Supp. 2d 135, 140 (D.D.C. 1999), *judgment aff'd in part, vacated in part, McBryde v. Comm. to Review Circuit Council Conduct*, 264 F.3d 52 (D.C. Cir. 2001) (confidentiality provision for judicial discipline "operates as an impermissible prior restraint" and disciplined judge "must enjoy the opportunity to speak openly

and freely about [the] proceedings" against him). *McBryde* thus instructs that even Congress cannot enact a law that gags federal judges from speaking about their disciplinary proceedings. SEC's only response to this argument is a parenthetical that emphasizes that *McBryde* was a "*contested*" disciplinary proceeding. SEC-Br. 31 n.4.[1] Nothing in *McBryde* turned on the proceedings being *contested*, other than an unconstitutional law must be challenged by *someone*. The case held that the judicial discipline *statute* could not constitutionally bar Judge McBryde's right to publicly discuss his own discipline:

> [T]he Court finds that [the statute], as it has been applied to Judge McBryde, operates as an unconstitutional prior restraint on his ability to speak. The interest in shielding witnesses from publicity and encouraging complainants to come forward in the future, while legitimate, is insufficient to justify the restriction on Judge McBryde's open and frank discussion of the proceedings once they have concluded and sanctions have been imposed.

McBryde, at 178; *see also id.* at 176 (reviewing state judicial discipline statutes and noting that "[i]n no jurisdiction, however, does the mandate of confidentiality continue in perpetuity").

In *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829 (1978), the Supreme Court reversed the Virginia Supreme Court's enforcement of a Virginia law that

---

[1] This ignores the coercive nature of SEC's enforcement and "consent" processes. Indeed, while some may wish to maintain a contested process, few can afford to do so. *See infra* I.E.

forbade and criminalized disclosure of confidential judicial misconduct proceedings. That decision rests on the public's right to information, something no defendant in SEC proceedings has power to waive. *See* Jason Mazzone, *The Waiver Paradox*, Nw. U. L. Rev. 801, 824 (2003) ("The problem with asking individuals to give up [First Amendment] rights as a condition of receiving some governmental benefit is that these rights are public rights that 'lie[] at the foundation of a free society' and … conditions involving an individual's waiver of [those] rights are 'at war with the deeper traditions of democracy embodied in the … Amendment.'") (quoting *Shelton v. Tucker*, 364 U.S. 479, 486 (1960) and *Elrod v. Burns*, 427 U.S. 347, 357 (1976)). If legislative bodies cannot pass laws that shield judicial discipline from public scrutiny, a topic which lies at the core of First Amendment interests, it is axiomatic that a mere agency may not self-confer such power by rule. "It is rare that a regulation restricting speech because of its content will ever be permissible … were we to give the Government the benefit of the doubt when it attempted to restrict speech, we would risk leaving regulations in place that sought to shape our unique personalities or to silence dissenting ideas." *Playboy*, 529 U.S. at 818. Affirming the court below would entail denying First Amendment rights to the public that federal judges themselves enjoy.

E. The Gag Is Not "Something SEC Might Have Won in Litigation"

SEC opens its brief citing the Supreme Court that consent judgments are "compromises in which the parties give up something they might have won in litigation." SEC-Br. 3 (quoting *U.S. v. ITT Cont'l Baking Co*., 420 U.S. 223, 235 (1985)). Precisely. *The right to speak truthfully about your case is not something that can be won or lost in litigation*. Yet under its scheme, only those charged by the SEC who have the resources to devote multimillions to a years-long battle to the finish can speak freely about the charges, whether they are exonerated or convicted.

Mark Cuban and other defendants *exonerated* at trial have been outspoken in their critiques of the SEC.[2] So are scholars. "From the outset to its conclusion, the

[2] Eric Fuchs, *Why the SEC Lost Its Big Case Against Mark Cuban,* BUSINESS INSIDER (Oct. 17, 2013), https://www.businessinsider.com/how-mark-cuban-defeated-the-sec-2013-10 ("Cuban gave an impassioned speech after the verdict calling the SEC 'big bullies' for suing him. Cuban spent more on the suit than he would have if he'd just paid a penalty, but he wanted to prove a point: The SEC never should have gone after him. Cuban is probably correct, mainly because the SEC didn't have much evidence on its side."); *see also*, Telis Demos, *The man who beat the SEC,* FORTUNE MAGAZINE (June 18, 2008, 3:48 AM), available at https://archive.fortune.com/2008/06/06/magazines/fortune/Man_who_beat_SEC_Demos.fortune/index.htm (relating the similar experience of Phil Goldstein). If Cuban had made the economically rational decision to settle, the public would never know that SEC uses its settlement power to regulate through settlements that which it could never achieve at trial. *See* Br. 40, 46 (citing SEC Commissioners' concerns about SEC's power to create law never enacted by Congress). How many other Mark Cubans are out there, silenced by their lack of resources to fight?

SEC's case against Cuban was not impressive." Marc I. Steinberg, *The SEC v. Mark Cuban*, HARV. L. FORUM ON CORP. GOV. (Apr. 11, 2019).[3] As Steinberg noted:

> The SEC also stretched the contours of the insider trading prohibitions of Section 10(b) in a manner inconsistent with U.S. Supreme Court precedent. … The *SEC-Cuban* case illustrates that, *absent resource to plentiful liquid assets or to an impressive insurance policy, targets of government actions have no viable recourse but to settle on the most practicable terms.*

Id. (emphasis added).

So, too, *convicted* securities act violators may freely speak. CNBC's Squawk Box recently broadcast interviews with two prominent SEC violators convicted by juries and imprisoned for years, Rajat Gupta and Raj Rajaratnam who have since published books highly critical of the SEC cases against them. *See* Interview by Andrew Ross Sorkin, CNBC, with Rajat Gupta (Mar. 22, 2019) (Prosecutors should have gone after individuals not financial institutions; real culprits were not prosecuted);[4] *see also* Interview by Andrew Ross Sorkin, CNBC, with Raj Rajaratnam (Dec. 8, 2021).[5] The most poignant moment in the Sorkin interviews is when, Rajaratnam expresses gratitude for his first-generation American citizenship: "How lucky I am to live in this country … because you can speak out without being penalized." Raj Rajaratnam Interview at 18:43-19:10. Amazingly, for a country that

---

[3] *Available at* https://corpgov.law.harvard.edu/2019/04/11/the-sec-v-mark-cuban/.
[4] *Available at* https://www.youtube.com/watch?v=COzlQzkhCoQ.
[5] *Available at* https://www.youtube.com/watch?v=bqrrOyQh38A.

bills itself as the flagship nation of free speech, for fifty years SEC's gag rule has reserved that speaking privilege only for those with resources far beyond those of most Americans who can finance a fight to the bitter end. Worse, it allows SEC to obtain something it could never win at trial—the coerced silence of the thousands of defendants it charges and with whom it settles.

When SEC files charges—which are routinely accompanied by an inflammatory press release cementing the government's view of events into the public record—only the very wealthiest accused, who have the resources to fight SEC to the conclusion of trial, can emerge from the administrative maw with the ability to challenge that viewpoint. Because SEC proceedings are so costly, *see* Op. Br. 11-12, nearly all people charged will never be able to challenge the government's reputation and occupation-destroying aspersions of guilt—for life. Among other deleterious effects, this rule puts free speech only within reach of the ultra-wealthy. It also creates obvious incentives for the agency to overcharge; as noted by one law review, "the consent decree emboldens the Commission—retaining the court as its ongoing enforcement partner."[6] Courts must not be complicit in this unconstitutional scheme.

---

[6] Michael Macchiarola, *Hallowed by History but Not by Reason: Judge Rakoff's Critique of the SEC's Consent Judgment Practice*, 16 CUNY L. Rev. 51, 71 (Winter

Hundreds of federal administrative agencies manage to robustly regulate Americans, but only two agencies, SEC and CFTC,[7] impose this prior restraint on speech as a condition of settlement. SEC's brief fails to make a case for any compelling public interest this serves or that a gag is the least restrictive means to advance such an interest. The only rationale the rule itself offers is that SEC wants "to avoid creating or permitting to be created an impression that a decree is being entered or a sanction imposed, when the conduct alleged did not, in fact, occur." In short, it doesn't like criticism. SEC's brief offers a tepid additional justification, that amounts to little more than "that was the deal." SEC. Br. 38. But that is not a *deal*, because the gag rule compels the condition before any settlement discussion could even begin. Because no legitimate public interest is served by an agency's discomfort with criticism and clearly a coerced prior restraint is the *most* restrictive means to achieve that illegitimate end, SEC has not met its burden of overcoming the presumption against the constitutionality of a prior restraint, content-based restriction, and the multitude of doctrines this practice offends.

2012) ("The irony of truth taking a back seat to convenience in the federal securities realm cannot be overstated.").

[7] Counsel for Appellants have petitioned to remove the gag part of the rule and simply allow for SEC and defendants to negotiate constitutionally permissible settlements in which they can admit, deny, or neither admit nor deny SEC's allegations. Period. No gag. The "no admit, no deny" settlement option is untouched; the proposed rule changes seek to omit only the gag's prior restraint and content-based ban on all future speech. *See* New Civil Liberties Alliance, *Petition to Amend* (Oct. 30, 2018), *available at* https://bit.ly/SECGagRulePet.

"*Unlawful acts, performed long enough* and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020) (emphasis added). "Acquiescence for no length of time can legalize a clear usurpation of power … frequently yielded to merely because it is claimed." Thomas Cooley, *A Treatise on Constitutional Limitations*, 71 (1868). "The construction given to the laws, by … the executive government, is necessarily *ex parte*, without the benefit of an opposing argument … [but] the judicial department … is not at liberty to surrender, or to waive [constitutional rights]." *U.S. v. Dickson*, 40 U.S. 141, 161-62 (1841) (Story, J.).

II. SEC MISCONSTRUES THE CONTROLLING CASE LAW

A. Defendants' Constitutional Claims Are Before this Court

SEC asserts that the district court "never addressed" defendants' constitutional arguments. SEC-Br. 9. Not so. The court addressed defendants due process arguments on the merits, erroneously disagreeing with the claims by falling into the all-too-common error of reducing due process to notice and opportunity to be heard, by failing to acknowledge *there would be no settlement the terms of which Novinger could contest because there will never be a deal before the court unless the consent is signed,* and finally by failing to acknowledge that the scope of due

process encompasses a great deal more than just notice and an opportunity to be heard.

The district court also addressed, again erroneously, defendants' jurisdictional arguments but misconstrued the law as requiring a total want of jurisdiction. Neither *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2018), nor this Circuit requires a total want of jurisdiction. If SEC's argument, that by merely invoking the court's jurisdiction to set aside a judgment a defendant nullifies any jurisdictional basis for Rule 60 relief, there would never be a successful jurisdictional claim under the Rule. By thus mischaracterizing the law, and, frankly, disemboweling the rule of its jurisdictional content, both SEC and the district court disserve Rule 60's purpose to operate in service of "substantial justice." *Carter v. Fenner*, 136 F.3d 1000, 1007 (5th Cir. 1998).

But that is not the law here or in any circuit. *Espinosa* does not purport to exhaust all grounds for 60(b)(4) relief. In fact, it expressly disclaims that role and further identifies "a clear usurpation of power" as a distinct and unaddressed basis for Rule 60(b)(4) relief. *Espinosa*, 559 U.S. at 271 ("This case presents no occasion … to define the precise circumstances in which a jurisdictional error will render a judgment void[.]"). *Brumfield v. La. State Bd. of Educ.*, 806 F. 3d 289, 298 (5th Cir. 2015) (Jones, J.), a case that controls the district court here, makes these identical points. *Id.* ("*Espinosa* ... [did] not definitively interpret [] [Rule 60(b)(4)]."). The

court below erred by failing to address whether there is *ever* an opportunity to be heard when SEC conditions its presence at the bargaining table on a signed consent surrendering an individual's speech rights in perpetuity because, despite *Brumfield*, the court read the scope of defendant's due process claims under-inclusively and erroneously. It erred by mischaracterizing defendants' argument that "lack of power" *means* "lack of jurisdiction" and by ignoring this Circuit's authority for setting aside judgments in whole or in part for reasons other than a total want of jurisdiction, the district court erred. *See, e.g.*, *Carter*, 136 F.3d 1008. But the court below addressed the merits, and we now do, too.

B. The District Court Decision Conflicts with the Supreme Court's Decision in *Klapprott* and Precedents in Other Circuits

Espinosa could not have defined the entire universe of cases where relief is justified under Rule 60(b)(4), and it expressly stated so. Furthermore, it would contradict what five justices agreed upon in *Klapprott v. U.S.*, 335 U.S. 601, 609-10, 616-620 (1949).[8]

---

[8] Justice Black announced the "judgment of the court," joined by Justice Douglas. Justices Rutledge and Murphy concurred in the result and "upon the assumption that the rules of civil procedure may apply in denaturalization proceedings," were "substantially in accord with the Black opinion." Justice Burton concurred entirely with the majority opinion but did "not express an opinion on any matters not before this Court." The Supreme Court has consistently cited Justice Black's opinion as a majority opinion entitled to precedential value. *See*, *e.g.*, *Gonzales v. Crosby*, 545

Approving of the petitioner's Rule 60(b)(4) motion in *Klapprott*, Justice Black stated that Rule 60(b)(4) allows a court to reopen a "judgment … if the hearing of evidence is a legal prerequisite to rendition of a valid default judgment …." *Id.* at 609 (concluding that the denaturalization statute required the district court to hear evidence before entering a default judgment). Note that Justice Black relied exclusively upon the district court's lack of power to act without satisfying certain statutory procedures as the reason the judgment was void. *Id.* at 609-10. He never mentioned a lack of personal jurisdiction, subject matter jurisdiction, nor a due process violation. Instead, he reasoned that the district court lacked the *power* to render "a valid default judgment" without "any evidence" and therefore, Rule 60(b)(4) allowed for relief from the void judgment. *Id.* at 609.

If the Court in *Espinosa* were to have listed all possible circumstances under which a litigant can invoke Rule 60(b)(4), it would have implicitly overturned *Klapprott*. Given that "[the Supreme] Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio* [,]" it is safe to conclude that *Espinosa* did not intend to overturn *Klapprott*. *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000).

U.S. 524, 534, 542 (2005); *see also Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 394 (1993).

Thus, *Klapprott* not only shows that *Espinosa* does not define the entire universe of Rule 60(b)(4) claims, but it also affirmatively demonstrates why the district court must be reversed because district courts must reopen and correct judgments, they had no power to enter in the first place. 335 U.S. at 609. SEC's brief does not cite a single Supreme Court case that supports a lower federal court's entry of an unconstitutional consent order.

The district court decision further conflicts with precedents in the Ninth, Fourth, and Sixth Circuits which have held that courts lack power to enter unconstitutional prior restraints and content-based speech restrictions as conditions on settlement or agreements with government. *See Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1399 (9th Cir. 1991) (government's extraction of a waiver of a party's constitutional right to seek public office in the future as a condition to settling the lawsuit was unconstitutional condition that could neither be won nor lost in the litigation.); *Overbey v. Mayor of Balt.*, 930 F.3d 215, 219 (4th Cir. 2019) (invalidating the portion of a consent settlement that required the plaintiff to agree "not to speak to the media" about police misconduct); *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F. 3d 1071, 1077 (6th Cir. 1994) (contract that conditioned a government benefit on waiver of right to free expression is unenforceable).

1. Due Process

SEC is quite clear—the non-negotiable terms of *its* consent, *see* SEC Br. 4, to even come to the settlement table—is that defendant must sign the "consent"[9] SEC drafted that strips defendants of their First Amendment rights. Stated another way, SEC requires defendants to self-mutilate and surrender their bedrock constitutional rights or *there will be no settlement*. Had Novinger, or any other defendant, refused to sign the consent gag, SEC *admits* there could be no hearing on a settlement because there would be no settlement! Defendants' only option if they intend to preserve their First Amendment rights is, SEC admits, to finance a trial to verdict, SEC. Br. 4, a price payable only by the ultra-wealthy. *See supra* I.E. Further, judicial orders, enforceable by contempt proceedings, violate due process if they are not sufficiently specific to provide fair notice of the required or prohibited conduct. *See Scott v. Schedler*, 826 F.3d 207, 211-12 (5th Cir. 2016); *see also* AFPF *amicus* 15.

2. Jurisdiction

The district court and SEC wrongly construe *Espinosa* to require a total want of jurisdiction. Courts that otherwise have personal and subject-matter jurisdiction

---

[9] SEC cleverly puts the gag and related language in a separate agreement that then is incorporated into the judgment by reference. As *amicus* argues, because the clear terms of the agreement are not made part of the judgment, this agreement additionally violates Rule 65(d) and due process. AFPF *amicus* 14-15.

routinely void unconstitutional terms of settlements. *See, e.g. Davies*, 930 F.2d at 1399 (voiding only the unconstitutional provision that a party surrender his right to run for office in the future); *People v. Smith*, 502 Mich. 624 (2018) (same); *Overbey*, 930 F.3d at 219 (only the "don't talk to the press" part of the judgment was vacated, all other terms remained in place); *G & V Lounge*, 23 F. 3d at 1077 (provision of a contract that conditioned a government benefit on a waiver of right to free expression was unenforceable.) In *SEC v. Bolla*, 550 F. Supp. 2d 54 (D.D.C 1983), the district court held void under Rule 60(b)(4) a particular penalty Congress lacked power to assess. This Circuit has set aside a judgment under 60(b)(4) where grounds other than jurisdiction or due process meant the judgment was void. *See Carter*, 136 F. 3d at 1008.

Thus, SEC's drumbeat argument that "the list of 60(b)(4) "'infirmities' has just two entries" and that a total want of jurisdiction is required are belied by case after case affording relief under Rule 60(b)(4).

So, too, the district court's cryptic suggestion in the last footnote of its opinion that Rule 60 "is not an appropriate avenue by which to address these concerns" is mistaken. ROA.513. In taking that view, the district court diverges from a substantial body of law to the contrary. Reading *Espinosa* as the district court and SEC suggest strips away Rule 60(b)(4)'s protection of constitutional liberties that have long undergirded its purpose. *See* 11 Charles Allen Wright & Arthur Miller, Fed. Prac. &

Proc. Civ. § 2862 (3d ed.) (citing *Crosby v. Bradstreet*, 312 F.2d 483 (2d Cir. 1963), twice—once for voiding unconstitutional judgments, and again for the proposition that a 30-year-old void judgment can be set aside.); *see also* 47 Am. Jur. 2d Judgments § 653 ("Since a consent order is enforceable as a judicial decree, it is subject to a motion for relief from judgment like other judgments and decrees. … [A] judgment allegedly void on constitutional grounds is subject to attack at any time."); 49 C.J.S. Judgments § 506 ("A consent judgment may be set aside where it is void on constitutional grounds"). It would be odd for a Supreme Court case that did not address a constitutional claim at all to summarily wipe out relief for constitutional voidness without any discussion of that momentous change to the law in the opinion. And as argued above, *Klapprott* requires reversal.

C. SEC Has Admitted That Rule 60 Is the Proper Mechanism

In its 2019 briefing in *Cato Inst. v. SEC*, signed by the same SEC counsel as here, SEC argued that jurisdiction was lacking for that collateral attack on the gag because "[s]ettling defendants … can seek relief from the original courts that entered the consent judgments." Brief of SEC at 18, *Cato Inst. v. SEC*, 438 F. Supp. 3d 44 (D.D.C. 2020), ECF No. 12-1. SEC argued in *Cato* that there were only two ways of challenging the gag: 1."[T]he settling defendants [can] publicly deny the allegations and [when] the Commission moves to vacate the consent judgments in response to that breach, the defendants can raise any constitutional issues before the court that

will hear the Commission's motion." *Id.* Or, "*the settling defendants can invoke the First Amendment by moving for modification of their consent judgments before speaking, as a settling defendant recently did. SEC v. Allaire*, No. 03-cv-4087 … Either way, the *proper vehicle* is review of the consent judgments before the courts that entered them." *Id.* (emphasis added). SEC should be bound by its admissions made before courts. *Cf. Gabarick v. Laurin Mar. (Am.) Inc.*, 753 F.3d 550, 553 (5th Cir. 2014) (discussing doctrine of judicial estoppel). Its shifting positions from one litigation to another is a transparent ploy to block any path to relief.

"It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress." *Marbury v. Madison*, 5 U.S. 137, 147 (1803) (citation omitted). Courts must step in to redress these unconstitutional orders.

D. Collateral Bar Rule

The SEC did not suggest in *this* action that defendants should violate the gag and then raise a First Amendment defense, undoubtedly because the D.C. Circuit emphatically recognized that with respect to these very same SEC gag orders, "[v]iolations of court orders are punishable by criminal contempt." *Cato Inst.*, 4 F.4th at 95.

Defendants not only would face criminal contempt, but the collateral bar rule provides that they must either comply or seek relief in the court that entered the

unconstitutional order. *See Walker v. City of Birmingham*, 388 U.S. 307, 336 (1967); *see also Celotex Corp. v. Edwards*, 514 U.S. 300 (1995; *U.S. v. Cutler*, 58 F. 3d 825, 832 (2d Cir. 1995) ("Under the collateral bar doctrine, a party may not challenge a district court's order by violating it.").

SEC also makes an unfounded argument that defendants have waived the collateral bar point by only raising it in a footnote. SEC. Br. 30 n.3. SEC is wrong. Defendants made this argument right up front in the text of their opening brief to reinforce why Rule 60(b)(4) is the path to relief, citing Fifth Circuit authority providing a collateral bar on vindicating speech rights by speaking first, defending later. Op. Br.7-8.

The collateral bar rule is one reason that prior restraints are considered the worst form of First Amendment violation as noted by the district judge in *McBryde*, calling the rule an "immediate menace" ['[f]or if a person must pursue his judicial remedy before he may speak, parade, or assemble … [the reason therefor] will have become history and any later speech … will be fruitless or pointless." 83 F. Supp. 2d at 174. Accordingly, that court ruled the judicial gag unconstitutional on a pre-enforcement challenge.

SEC also impermissibly argues for the first time on appeal that defendants are seeking an improper advisory opinion. SEC. Br. 10, 28. SEC did not raise this claim below and accordingly it is waived. *See U.S. v. Caceres*, 745 F.2d 935, 936-37 (5th

Cir. 1984) ("The Government, however, did not raise the … issue below and cannot rely on it for the first time here."). In any event, the argument has no merit. A party bringing a pre-enforcement First Amendment challenge to a statute need not demonstrate to a certainty that it will be prosecuted under the statute to show injury, but only that it has "an actual and well-founded fear that the law will be enforced against" it. *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988). SEC's public threats to reopen proceedings if statements it doesn't like are not retracted, *see* AFPF *amicus* 11-14, easily meets this standard.

E. *Romeril*'s Reading of *Crosby* Creates an Intra-Circuit Split

The Second Circuit panel decision in *SEC v. Romeril*, 15 F.4th 166 (2d Cir. 2021), *reh'g denied*, No. 19-4197 (2d Cir. December 21, 2021), cannot be squared with Chief Judge Lumbard, Judges Moore and Hays's unanimous and clarion decision in *Crosby*. As the numerous law treatises that cite *Crosby* prove, it is the seminal decision that recognizes that courts are bound by the Constitution and may not enter orders that violate it.

The *Romeril* panel, noting that it "is understandable" to think that *Crosby* would control, decided to posit an entirely different rationale for *Crosby*—one not addressed by the *Crosby* court nor supportable by the facts of the case. *Id.* 175. The problem with such decision-day judicial advocacy recasting the grounds for *Crosby*, is that neither party to the suit had the opportunity to brief and respond to the court's

revisionist ruling. This occurred in direct violation of the party presentation principle recently reinforced in Justice Ginsburg's decision for a unanimous Court in *U.S. v. Sineneng-Smith*, 140 S. Ct. 1575 (2020). There, the Supreme Court admonished circuit courts to not substitute other grounds for decision from those presented by the parties to the litigation. The Supreme Court accordingly vacated the Ninth Circuit's decision and ordered "reconsideration shorn of the overbreadth inquiry interjected by the appellate panel and bearing a fair resemblance to the case shaped by the parties." *Id*. at 1582. Due process of law requires no less.

This is particularly true where the factual foundation for the *Romeril* court's re-casting of *Crosby*, turned out to be completely unsupported by the actual court record. The complete *Crosby* file, of which courts may take judicial notice, was filed with the Second Circuit court in en banc proceedings, and it entirely belies the hypothetical alternate rationale concocted in *Romeril*. *See* Special App'x, *SEC v. Romeril*, 15 F.4th 166 (D.C. Cir. 2021), ECF No. 140. That *Crosby* was emphatically decided on First Amendment grounds is evident in a judicial record that proves that notice was served on all parties to the injunction. *Id.* at (SA25-30, 64-68, 108). The *Romeril* panel's rewriting of *Crosby* doubly violates Mr. Romeril's right to due process of law because he had no notice or opportunity to address the new grounds for decision.

Despite the Second Circuit's decision in *Romeril*, *Crosby* has shown surprising vitality for such an allegedly discredited ruling. In November 2021, a federal district court in *Baskin v. Royal Goode Productions LLC*, Case No. 8:21-cv-2558-VMC-TGW, 2021 WL 6125612, *6 (M.D. Fla. Nov. 19, 2021) relied on *Crosby* when refusing to enter an injunction to enforce a prior restraint based on private contract. *Baskin*, at *5–6.

Crosby is a seminal case, still cited after its *sub silentio* reversal, and should not be dismissed because it is "out-of-circuit" as the district court did here or because the Second Circuit declined to follow the fifty-year-old "law of the circuit." The measure of a case's authority is neither geographic nor temporal—it lies in the power of its reasoning and the admirable judicial fortitude of that 1963 unanimous panel to insist that courts will not violate the Constitution even upon private agreement. Here, where the *government* is violating core civil liberties, courts must not be handmaidens to entry of the Executive's unconstitutional and lawless prior restraints. Reversal of the district court will not only protect core First Amendment rights, but also the public's right to information, something no defendant has the power to waive.

SEC also plays scaremonger arguing that reversal of the district court decision will open the floodgates of constitutional challenges to final orders. SEC Br. 7, 24. *Klapprott* and *Crosby* have been on the books for decades holding that void

judgments are subject to attack at any time without occasioning a discernible disturbance of final orders. Further, depriving Americans of their constitutional rights because courts fear an increased workload is illegitimate on its face.

III. COURTS LACK POWER TO ENTER UNCONSTITUTIONAL ORDERS

Ultimately this case comes down to whether the Constitution is supreme. Is the Constitution's prohibition of prior restraints a higher law to which federal courts must conform before entering decrees that violate the First Amendment? If so, the district court's incorrect burden shifting and citation of cases that do not address voidness for unconstitutionality are irrelevant because of the constitutional command.

The Constitution binds every branch of government. When Congress enacts a law that violates the Constitution, the law is "void." *Marbury*, 5 U.S. at 177. All three branches are so bound; any unconstitutional exercise of power is "void." *Montgomery v. Louisiana*, 577 U.S. 190, 203 (2016). The district court opinion contravenes the Supreme Court's holding that a judgment may be void if the court entered "a decree which is not within the powers granted to it by the law." *U.S. v. Walker*, 109 U.S. 258, 265-67 (1883), *superseded by rule as stated in Espinosa*, 559 U.S. at 275 n.12 ("…a court may have jurisdiction over the parties and the subject-matter, yet if it makes a decree which is not within the powers granted to it … its decree is void.").

CONCLUSION

If the First Amendment means anything, it guarantees that Americans' right of future truthful free expression is never on the table in any government prosecution. Courts may not enter or supervise agreements, on consent or otherwise, in which a government prosecutor conditions the government's cessation of a prosecution upon a party's surrender of his right to criticize the government.

The founders who enshrined the right of free speech in the First Amendment would never in their wildest imaginations have envisioned that a mere government agency could silence speech, dictate the content of speech, and compel corrective speech by those who would criticize that agency's actions. Free speech cannot be cancelled by *any* government agency, much less a powerful agency armed with well-worn tools of debarment, massive fines, disgorgement, and other life-altering penalties that serve to bend defendants into submission. This court should decline to perpetuate such a disturbing partnership of powers that must be and are constitutionally separated.

Date: February 18, 2022

Respectfully submitted,

/s/ Margaret A. Little
Margaret A. Little
New Civil Liberties Alliance
Kara M. Rollins
Mark Chenoweth
Attorneys for Appellants
Christopher A. Novinger and ICAN
Investment Group, LLC

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: February 18, 2022. New Civil Liberties Alliance

/s/ Margaret A. Little
Margaret A. Little
New Civil Liberties Alliance
Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of 5th Cir. R. 32(a)(7)(B) because this brief contains 6,478 words out of 6,500, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word for Office365 Times New Roman 14-point font.

/s/ Margaret A. Little
Margaret A. Little
New Civil Liberties Alliance
Attorneys for Appellants
Christopher A. Novinger and ICAN
Investment Group, LLC